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No. 10-1177

In the Supreme Court of the United States

WYETH LLC AND WYETH PHARMACEUTICALS INC.,
Petitioners,

v.

JERALDINE SCOFIELD, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Petitioner has presented two questions in its petition, each of which independently warrants this Court's review. This *amicus* brief will be limited, however, to the first question presented in the petition—namely, whether due process requires a new trial (as opposed to a remittitur) when, as here, a verdict is the product of a party's appeals to the jury's passion and prejudice.

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 100 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of the law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 925 briefs as amicus curiae in both state and federal courts, including more than 75 in this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. Appendix A lists PLAC's corporate members.[1]

Because PLAC's members frequently are subjected to inappropriate efforts by opposing counsel to

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. Both parties consented to the filing of this brief.

inflame the passions and prejudice of the jury, PLAC has a powerful interest in this Court's resolution of the remedial issue presented by petitioner. PLAC submits that this Court's review is needed to clarify that remittitur is not a constitutionally adequate remedy when, as here, a jury's verdict is the result of appeals to passion and prejudice.

SUMMARY OF ARGUMENT

In a series of cases, this Court has explained that, when a jury's verdict in a civil case is the result of passion and prejudice, a new trial is necessary. Because a finding of passion and prejudice necessarily means that the jury has abandoned its function as a neutral factfinder, remittitur of the damages does not remedy the problem. Although this principle would seem to be straightforward, the lower courts have evinced substantial confusion over its proper application.

To begin with, the lower courts have disagreed as to whether the principle is grounded in the Due Process Clause—and thus applies with full force in state-court cases involving state-law causes of action—or whether it is merely a rule of federal common law that may be persuasive, but is not controlling, in state-law cases.

In addition, confusion has arisen because "passion and prejudice" has taken on multiple meanings, which often are conflated by the lower courts. In some circumstances (like here), the term is used to describe a jury that has been biased by identifiable, extrinsic events that occurred during the trial—such as inflammatory evidence or inappropriate comments by counsel. In other cases, courts may use the term when a verdict is so patently unreasonable as to

compel an inference that the jury had departed from is role as an impartial arbiter. Finally, some courts have invoked the term "passion and prejudice" as a rationale for reducing a verdict that is excessive, albeit not monstrously so.

The decision below is emblematic of the confusion in the lower courts. Although it recognized that the jury may have been infected by actual passion and prejudice, stemming from identifiable misconduct at trial and evidenced by a massively excessive verdict, the Nevada Supreme Court nonetheless concluded that remittitur was a sufficient remedy. That conclusion flies in the face of the Due Process Clause's guarantee of a neutral factfinder.

This case, accordingly, is an ideal vehicle for putting an end to the lower courts' conceptual confusion. The Court should grant certiorari and make clear once and for all that a remittitur is not a constitutionally sufficient remedy for a verdict that is the result of discernible passion and prejudice.

ARGUMENT

THE QUESTION WHETHER DUE PROCESS REQUIRES A NEW TRIAL WHEN A VERDICT IS THE PRODUCT OF DISCERNIBLE PASSION AND PREJUDICE IS AN IMPORTANT ONE THAT WARRANTS REVIEW.

A. Although This Court Has Held That A New Trial Is The Proper Remedy For Passion And Prejudice, Its Failure To Identify The Source Of This Rule Has Caused A Divide In The Lower Courts.

On several occasions, this Court has identified the fundamental principle that, when a verdict is the

result of passion and prejudice, the appropriate remedy is a new trial before a new jury. But because the Court has not identified the source of this rule—*i.e.*, whether it derives from the Due Process Clause or federal common law—the lower courts have evidenced enormous confusion over its applicability in cases arising under state law.

1. In early cases, this Court explained that a verdict rendered by a jury inflamed by passion and prejudice must be set aside in its entirety, and that remittitur is an inadequate remedy.

The Court's first articulation of the principle was in *Arkansas Valley Land & Cattle Co.* v. *Mann*, 130 U.S. 69 (1889), a case involving a claim for conversion of cattle. The defendant in *Mann* contended that the remittitur ordered by the trial court was so substantial (more than half the verdict) as to require the conclusion that the jury was "either governed by passion, or had deliberately disregarded the facts" and that, as a consequence, the entire verdict should have been set aside. *Id.* at 74-75. This Court agreed that, had the trial court been of the view that the verdict was the product of passion, "it would have been in accordance with safe practice to set aside the verdict and submit the case to another jury." *Id.* at 75. Quoting with approval Justice Clifford's opinion in *Stafford* v. *Pawtucket Haircloth Co.*, 22 F. Cas. 1030, 1030-1031 (C.C. R.I. 1862), the Court explained that "'where the circumstances clearly indicate that the jury were influenced by prejudice, or by a reckless disregard of the instructions of the court,'" remittitur "'cannot be allowed'"; instead, "'[w]here such motives or influences appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their

entire finding.'" *Mann*, 130 U.S. at 75. The Court concluded, however, that it could not assume merely from the amount of the remittitur "that the court below believed that the jury were governed by prejudice, or willfully disregarded the evidence." *Ibid.* It accordingly held that it lacked the authority to interfere with the remedy selected by the trial court. *Id.* at 75-76.

The Court next confronted the "passion and prejudice" issue in *New York Central Railroad* v. *Johnson*, 279 U.S. 310 (1929). In *Johnson*, the Court found that trial counsel had engaged in conduct designed to improperly "appeal to passion and prejudice." *Id.* at 317. Notwithstanding the absence of a contemporaneous objection, the Court ordered a new trial, explaining that "[t]he public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice." *Id.* at 318.

Two years later, in *Minneapolis, St. Paul & Sault Ste. Marie Railway* v. *Moquin*, 283 U.S. 520 (1931), the Court was presented with the precise situation it had described in *Mann*. In *Moquin*, the petitioner sought to set aside a verdict under the Federal Employers' Liability Act "on the ground that misconduct of respondent's counsel in making appeals to passion and prejudice had prevented an impartial trial." *Id.* at 520. After finding that trial counsel had indeed engaged in misconduct, the Minnesota Supreme Court ordered a remittitur. This Court reversed, explaining: "In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice." *Id.* at 521. That is

because efforts to inflame passion or prejudice in a jury "may be quite as effective to beget a wholly wrong verdict as to produce an excessive one." *Ibid.* Accordingly, the Court held, "[a] litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent." *Id.* at 521-522.

Finally, in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 160 (1967) (plurality op.), the Court cited *Moquin* for the "general rule that a verdict based on jury prejudice cannot be sustained."

2. Although the Court has been consistent in its articulation of the principle that remittitur is not an adequate remedy for passion and prejudice, it has never identified the source of that rule—*i.e.*, whether it is a requirement of due process or instead is an aspect of federal common law.[2] Consequently, the lower courts have divided on the issue.

Several state courts have treated *Moquin* as controlling in cases involving state causes of action, implying that the rule is one of constitutional dimension. See, *e.g.*, *Higgs* v. *Dist. Ct. in and for Douglas County*, 713 P.2d 840, 861 (Colo. 1985); *Hash* v. *Ho-*

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[2] The petitioner in *Moquin* asserted that the principle is one of due process. Under the heading "Constitutional Requirements That This Principle Be Recognized," it argued that "[d]ue process implies a tribunal * * * [that is] impartial" and further that "there was no impartial trial in the present case" because "the jury acted under the influence of passion and prejudice." Br. for Pet. at 12-13, *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Moquin*, 283 U.S. 520 (1931) (No. 543), 1931 WL 32912 (internal quotation marks omitted). But the opinion does not indicate whether the Court agreed with that reasoning.

gan, 453 P.2d 468, 473 & n.15 (Alaska 1969); *Stokes* v. *Wabash R.R.*, 197 S.W.2d 304, 309 (Mo. 1946).

Other courts, however, have viewed *Moquin* as a rule of federal common law and thus treat it as merely persuasive authority in cases arising under state law. See, *e.g.*, *Quick* v. *Crane*, 727 P.2d 1187, 1198 (Idaho 1986); *Kugling* v. *Williamson*, 42 N.W.2d 534, 539 & n.6 (Minn. 1950); *Vandaveer* v. *Norfolk & W. Ry.*, 222 N.E.2d 897, 908 (Ill. App. Ct. 1966). Indeed, the California Court of Appeal has expressly *rejected* the view that *Moquin* is a due process case, stating that, because *Moquin* "was not announcing a rule of federal due process to guide litigation in state courts," it "is in no sense binding on this or any other California court." *Wollersheim* v. *Church of Scientology*, 6 Cal. Rptr. 2d 532, 546 (Ct. App. 1992).

As a result of this confusion over whether the *Mann/Moquin* rule is grounded in the Due Process Clause, the lower courts have divided on the question whether remittitur may be employed as a remedy for verdicts found to be the result of passion or prejudice. As petitioners detail, the vast majority of courts have followed *Moquin* and held that only a new trial may rectify a verdict that results from passion and prejudice. See Pet. 12-13. A minority of courts, however, have held that remittitur is a sufficient remedy. See Pet. 13-14; *Bonn* v. *Pepin*, 11 A.3d 76, 78 (R.I. 2011).

Review is needed to resolve the confusion over whether the *Mann/Moquin* rule is required by due process and hence whether that rule controls in cases arising under state law.

B. Additional Confusion Has Resulted Because Some Courts Conflate Passion And Prejudice With Excessiveness Of The Verdict.

The confusion in the lower courts about this issue has been exacerbated because the term "passion and prejudice" has taken on multiple meanings over the years. Courts frequently have conflated those distinct meanings, often selecting a constitutionally inadequate remedy as a result.

First, the term "passion and prejudice" can refer to situations in which events at trial—including the introduction of admissible, yet emotion-evoking, evidence; the regular attendance at trial of a badly injured and hence highly sympathetic plaintiff; or the inflammatory rhetoric of counsel—cause the jury to abandon its neutrality. See, *e.g.*, *Thamann* v. *Bartish*, 856 N.E.2d 301, 304, 308 (Ohio Ct. App. 2006) (holding that "defense counsel consciously engaged throughout the trial in a pattern of misconduct that was designed to inflame the jury's passion and prejudice," conduct that included "repeatedly making improper remarks about the plaintiff, his counsel, and their expert witnesses"). This category can be denominated *extrinsic* passion and prejudice because the passion and prejudice is the result of identifiable, external influences on the jury's deliberative process.

Second, many courts have reasoned that, when a verdict is massively in excess of any amount supportable by the evidence, the jury must have been animated by passion and prejudice—even in the absence of any discernible extrinsic source. See, *e.g.*, *Ramirez* v. *New York City Off-Track Betting Corp.*, 112 F.3d 38, 40 (2d Cir. 1997) ("It is true that the size of a jury's verdict may be so excessive as to be

inherently indicative of passion or prejudice and to require a new trial.") (internal quotation marks omitted); *Wells* v. *Dallas Indep. Sch. Dist.*, 793 F.2d 679, 684 (5th Cir. 1986) ("[A]t some point on the scale an excessive award becomes so large that it can no longer be considered merely excessive. At that point, when an award is so exaggerated as to indicate bias, passion, prejudice, corruption, or other improper motive, remittitur is inadequate and the only proper remedy is a new trial.") (internal quotation marks and citation omitted); *Coffin* v. *Coffin*, 4 Mass. 1, 41 (1808) (from the "exorbitancy" of damages, a court may "conclude that the jury acted from passion, partiality, or corruption"); *Branham* v. *Ford Motor Co.*, 701 S.E.2d 5, 23 (S.C. 2010) ("When a verdict is grossly excessive and the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury acted out of passion, caprice, prejudice, or other consideration not founded on the evidence, it becomes the duty of this Court, as well as the trial court, to set aside the verdict.") (internal quotation marks omitted); *Branch* v. *Bass*, 37 Tenn. (5 Sneed) 366 (1858) (a "grossly exorbitant" verdict may "furnish intrinsic evidence that the verdict was probably the result of partiality, passion, corruption, or some improper motive or influence").

Both of these two categories entail a judicial conclusion that a jury has become biased by passion and prejudice and thereby abdicated its role of neutral arbiter. Accordingly, only a new trial can adequately remedy the problem.

Confusion has arisen, however, as a result of a third way in which courts have used the term "passion and prejudice." Some courts, laboring under the view that they may intervene to correct an excessive

verdict *only* upon finding passion or prejudice, have created a legal fiction whereby any excessive verdict is deemed, at least in a formalistic sense, the product of passion or prejudice. The Supreme Court of Wisconsin, for example, long ago explained:

> The fact that larger damages are awarded than the court would give, were it to assess them, is not of itself sufficient to justify a reversal of the judgment. Before the court can interfere it must find in the verdict evidence of partiality, passion or improper bias or prejudice on the part of the jury.

Schultz v. *Chicago, M. & St. P.R. Co.*, 4 N.W. 399, 405 (Wis. 1880). Courts following this view of their limited authority accordingly must label any award they deem to warrant reduction as being the product of passion and prejudice—without regard to whether they have concluded that the jury actually departed from its required neutrality. See Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After* State Farm, 6 U. PA. J. CONST. L. 423, 508 n.597 (2004) ("[T]he passion or prejudice inquiry was usually just a legal fiction to challenge awards suspect in size alone."). See, *e.g.*, *Farber* v. *Massillon Bd. of Educ.*, 917 F.2d 1391, 1395 (6th Cir. 1990); *Matlock* v. *Greyhound Lines, Inc.*, 2010 WL 3171262, at *1-2 (D. Nev. 2010); *United States* ex rel. *Maxwell* v. *Kerr-McGee Oil & Gas Corp.*, 2009 WL 3161828, at *10 (D. Colo. 2009); *Carr* v. *Nance*, 2010 WL 5144789 (Ark. 2010); *Montesinos* v. *Zapata*, 43 So. 3d 97, 98-99 (Fla. Dist. Ct. App. 2010); *City of Hollywood* v. *Hogan*, 986 So. 2d 634, 647 (Fla. Dist. Ct. App. 2008); *Davis* v. *Walters*, 54 So. 3d 272, 276 (Miss. Ct. App. 2010);

Smith v. *Fairfax Realty, Inc.*, 82 P.3d 1064, 1070 (Utah 2003).

Unlike the first two senses in which the term "passion and prejudice" is used, this third sense does not entail a determination that the jury has abandoned its neutrality; it is merely a finding of excessiveness. Accordingly, remittitur is a perfectly sufficient remedy for this species of "passion and prejudice." But courts sometimes have conflated this third sense with the other two, with the result being that they have employed remittitur—and denied an unconditional new trial—despite concluding either from the existence of extrinsic sources or from the gross excessiveness of the awards that the jury was animated by passion and prejudice. See, *e.g.*, *McCabe* v. *Mais*, 580 F. Supp. 2d 815, 831 (N.D. Iowa 2008) (employing remittitur despite being "convinced that the jury impermissibly acted out of passion and a desire to punish")[3]; *Xay Fong* v. *All Lots, L.L.C.*, 771 N.W.2d 653 (table), 2009 WL 1492561, at *4 (Iowa Ct. App. 2009) (approving use of remittitur as a cure for counsel's prejudicial misconduct at trial); *Reiss* v. *Davis*, 2008 WL 5058013, at *4 (Minn. Ct. App. 2008) (affirming trial court's use of remittitur notwithstanding the trial court's finding "that the jury acted with passion or prejudice in awarding punitive damages"). Because, as we next explain, remittitur is a constitutionally inadequate remedy for such passion and prejudice, review is warranted to resolve the

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[3] The Eighth Circuit had no problem with the district court's decision to employ remittitur, but reversed for redetermination of the amount. *McCabe* v. *Parker*, 608 F.3d 1068, 1081-1082 (8th Cir. 2010).

confusion over the different meanings of "passion and prejudice."

C. Due Process Requires A New Trial When A Verdict Is The Result Of Passion And Prejudice.

The Court may straightforwardly resolve the lower courts' confusion by holding that due process requires a new trial whenever a court concludes, either because of the existence of extrinsic sources or from the gross excessiveness of a verdict, that the jury was animated by passion and prejudice. Basic principles of due process, as well as longstanding historical practice, require that holding.

1. "In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair." *Lassiter* v. *Dep't of Soc. Servs.*, 452 U.S. 18, 33 (1981). See also *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 9-10 (1991); *In re Winship*, 397 U.S. 358, 369 (1970) (Harlan, J., concurring). Courts "must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Lassiter*, 452 U.S. at 24-25.

The interests at stake here are of obvious importance. Indeed, "[i]t is axiomatic that 'a fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)) (alteration omitted). "Fairness of course requires an absence of actual bias in the trial of cases." *In re Murchison*, 349 U.S. at 136. In fact, "[n]ot only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endea-

vored to prevent even the *probability* of unfairness.'" *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975) (emphasis added) (quoting *In re Murchison*, 349 U.S. at 136). Thus the mere "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Ibid.*

When a jury has been infected by passion and prejudice, that necessarily means that it no longer is able to serve as an impartial factfinder and, as a result, that every aspect of its deliberations is tainted. As the Court has explained, "[t]here can be no justice in a trial by jurors inflamed by passion, warped by prejudice, awed by violence, menaced by the virulence of public opinion or manifestly biased by any influences operating either openly or insidiously to such an extent as to [poison] the judgment and prevent the freedom of fair action." *Groppi* v. *Wisconsin*, 400 U.S. 505, 511 n.12 (1971) (internal quotation marks omitted). Simply put, "a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness." *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989).

Yet remittitur is the functional equivalent of upholding a verdict: it is the denial of a new trial conditioned on the plaintiff's acceptance of a reduced amount of damages. It in no way rectifies the deprivation of an impartial factfinder with respect to underlying liability determinations, affirmative defenses, comparative fault, and other issues. Because a jury's departure from impartiality affects "all the questions in the case" (*Atchison, Topeka & Santa Fe R.R.* v. *Dwelle*, 24 P. 500, 506 (Kan. 1890)), only an unconditional new trial can remedy that problem.

See, *e.g.*, *Dossett* v. *First State Bank*, 399 F.3d 940, 947 (8th Cir. 2005) ("[I]f passion or prejudice influenced the jury's damages decision, then that same passion or prejudice may well have affected its decision on the issue of liability as well."); *Atchison, Topeka & Santa Fe R.R.* v. *Cone*, 15 P. 499, 505 (Kan. 1887) (ordering a new trial and explaining that "if one-half of the verdict was rendered under the influence of passion or prejudice, the other half must also have been rendered under the influence of passion or prejudice"); 11 Charles A. Wright et al., FEDERAL PRACTICE & PROCEDURE § 2815, at 165 (2d ed. 2010) ("[Remittitur] is not proper if the verdict was the result of passion and prejudice, since prejudice may have infected the decision of the jury on liability, as well as on damages. In those instances a complete new trial is required.").

Few principles of American law are more deeply entrenched than that there must be an adequate remedy "for the violation of a vested legal right." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Here, the "vested legal right" is the right to an impartial factfinder, and a determination that the verdict is the result of passion and prejudice is a finding of the violation of such a right. The Due Process Clause demands that the remedy be tailored to the violation. See *McKesson Corp.* v. *Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) (if a state collects a tax that discriminates against interstate commerce, the Due Process Clause mandates that the state provide backward-looking relief that fully removes the discriminatory effects of the unconstitutional tax). Because only a new trial before an impartial jury, and not a remittitur of the verdict, can eradicate the harm caused by a jury that has been ani-

mated by passion and prejudice, the Due Process Clause requires that remedy.

2. That conclusion is bolstered by historical practice. From its inception, remittitur was viewed as a cure for excessive verdicts alone; courts were nearly uniform in holding that remittitur was an insufficient remedy for verdicts that were the product of actual passion and prejudice.

"As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). See also *Schad* v. *Arizona*, 501 U.S. 624, 640 (1991) ("[H]istory and widely shared practice [are] concrete indicators of what fundamental fairness and rationality require."). Although history alone may not be sufficient to enshrine long-standing practice as a constitutional requirement, "such [historical] adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.'" *In re Winship*, 397 U.S. at 361-362 (quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968)).

The genesis of remittitur is typically traced to Justice Story's decision in *Blunt* v. *Little*, 3 F. Cas. 760 (C.C. Mass. 1822). See 11 FEDERAL PRACTICE & PROCEDURE § 2815, at 160. In *Blunt*, there was no finding that the verdict was the result of passion and prejudice; rather, Justice Story concluded that the award entered by the jury was simply excessive. 3 F. Cas. at 761-762. As a remedy, the case was remanded for a new trial, "unless the plaintiff [was] willing to remit $500 of his damages." *Id.* at 762. From that point forward, remittitur has been deemed a proper remedy for excessive verdicts. See, *e.g.*, *N. Pac. R.R.* v. *Herbert*, 116 U.S. 642, 646 (1886); *Hall*

v. *Nw. R.R.*, 62 S.E. 848, 853 (S.C. 1908); *Noxon* v. *Remington*, 61 A. 963, 964 (Conn. 1905); *Tarbell* v. *Tarbell*, 15 A. 104, 107-108 (Vt. 1888).

At the same time, courts were nearly uniform in holding that remittitur is an insufficient cure for a jury inflamed by passion and prejudice. Regardless of whether the passion and prejudice was evidenced by a grossly excessive verdict alone or instead stemmed from identifiable events during trial, courts regularly explained that verdicts returned by an impassioned and prejudiced jury could not be cured by remittitur. At the time the Supreme Court decided *Moquin*, courts in at least 26 states had explicitly adopted this rule.[4]

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[4] **Arizona:** *United Verde Copper Co.* v. *Wiley*, 183 P. 737, 738-739 (Ariz. 1919); **Colorado:** *F.M. Davis Iron Works Co.* v. *White*, 71 P. 384, 386 (Colo. 1903) ("[W]here the fault found with the verdict is not that it is merely excessive, but the largeness of the amount is due to improper motives on the part of the jury, a remittitur does not cure the defect, but the verdict should be set aside in its entirety."); *Tunnel Mining & Leasing Co.* v. *Cooper*, 115 P. 901, 902 (Colo. 1911); **Idaho:** *Geist* v. *Moore*, 70 P.2d 403, 407-408 (Idaho 1937); **Illinois:** *Loewenthal* v. *Streng*, 90 Ill. 74 (1878) (When a verdict "is so flagrantly excessive as to be only accounted for on the grounds of prejudice, passion or misconception, the *remittitur* does not remove the prejudice, passion or misconception."); **Indiana:** *Elliott* v. *Kraus*, 172 N.E. 783, 785 (Ind. Ct. App. 1930) (en banc); **Iowa:** *Ahrens* v. *Fenton*, 115 N.W. 233, 235 (Iowa 1908) ("If the verdict is vitiated by improper conduct of the jury, it is vitiated as a whole, and not simply to the extent that the trial court may think it in excess of what should reasonably be allowed."); **Kansas:** *City of Argentine* v. *Bender*, 80 P. 935, 935-936 (Kan. 1905); *Steinbuchel* v. *Wright*, 23 P. 560 (Kan. 1890); *Bell* v. *Morse*, 29 P. 1086, 1086 (Kan. 1892); **Kentucky:** *Taylor* v. *Giger*, 3 Ky. (Hard.) 586 (Ct. App. 1808); *Vanzant* v. *Jones*, 33 Ky. (3 Dana) 464 (1835); **Maine:** *Chaisson* v. *Williams*, 156 A. 154, 159 (Me.

1931); **Minnesota:** *Larson* v. *Wisconsin Ry., Light & Power Co.*, 164 N.W. 666, 668 (Minn. 1917); **Missouri**: *Chitty* v. *St. Louis, Iron Mountain, & S. Ry.*, 49 S.W. 868, 872 (Mo. 1899) ("[W]henever the damages are so excessive as to strike the judicial mind as being the result of passion, prejudice, or misconduct of the jury, it is [the court's] duty to reverse the judgment."); *Burdict* v. *Mo. Pac. Ry. Co.*, 27 S.W. 453, 458 (Mo. 1894); **Montana:** *Blessing* v. *Angell*, 214 P. 71, 73 (Mont. 1923) ("It is the well-settled rule that a remittitur will not cure a verdict tainted by passion and prejudice."); **Nebraska:** *Wainwright* v. *Satterfield*, 72 N.W. 359, 359 (Neb. 1897); **New Jersey:** *Tischler* v. *W. Jersey & Seashore R.R.*, 155 A. 139, 139 (N.J. 1931); **New Mexico:** *Henderson* v. *Dreyfus*, 191 P. 442, 446 (N.M. 1919) ("[W]here the amount of the verdict is the result of passion and prejudice, such passion and prejudice may and probably did influence the jury in the determination of the other issues in the case upon the decision of which the verdict was founded."); **North Carolina:** *Harvey* v. *Atlantic Coast Line R.R.*, 69 S.E. 627, 630 (N.C. 1910) ("[W]hen it is clear that a jury, in disregard of the testimony, has rendered a verdict under the influence of passion or prejudice, a presiding judge should be prompt to set the same aside."); **North Dakota:** *Larson* v. *Russell*, 176 N.W. 998, 1008 (N.D. 1919) ("In this state it is true that this court has held that a new trial must be granted absolutely, and there is no power to authorize a remittitur of a portion of the damages awarded, where the same are excessive through the influence of bias or prejudice upon the jury."); **Ohio**: *Schendel* v. *Bradford*, 140 N.E. 155, 157 (Ohio 1922) ("If the verdict was given under the influence of passion or prejudice, neither the trial court nor a reviewing court could require a remittitur. In that event no power exists in either but to reverse unconditionally."); *Toledo Rys. & Light Co.* v. *Paulin*, 113 N.E. 269, 270 (Ohio 1916); **Oklahoma**: *Rhyne* v. *Turley*, 131 P. 695, 696 (Okla. 1913) ("[T]he prejudice and passion which the record to our minds so clearly shows must have permeated the whole case, rendering it impossible to give to the evidence that fair and impartial consideration contemplated in a jury trial. Under such a situation, the court should have set this verdict aside and granted a new trial."); *Choctaw, Okla & Gulf R.R.* v. *Burgess*, 97 P. 271, 281 (Okla. 1908); **Oregon:** *Adcock* v. *Oregon R.R. & Navigation Co.*, 77 P. 78, 80 (Or. 1904) ("[W]here it

In *Atchison, Topeka & Santa Fe Railroad* v. *Dwelle*, 24 P. 500 (Kan. 1890), for example, the trial court found trial misconduct designed to inflame the jury's passion and prejudices, and thus ordered a remittitur. *Id.* at 506. The Kansas Supreme Court concurred that misconduct occurred at trial, but it rejected the trial court's attempt to remedy the problem by a remittitur, explaining: "If the jury were influenced by passion and prejudice in rendering the verdict which the court found to be excessive to so great an extent, there were sufficient grounds for holding that the entire verdict, and all the questions in the case, were likewise influenced." *Ibid.*

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clearly appears that the jury were influenced by passion or prejudice, the error cannot be cured by merely remitting a part of the verdict, but it must be entirely rejected, since the effect is to cast suspicion on the conduct of the jury and their entire finding."); **Rhode Island:** *Stafford*, 22 F. Cas. at 1030-1031; **Texas:** *Gen. Accident Fire & Life Ins. Corp.* v. *Bundren*, 283 S.W. 491, 494 (Tex. 1926) ("The authorities are almost uniform that even a trial judge in any case is not authorized to substitute his own judgment and remit a part of the verdict of the jury where such verdict evidences the existence of passion or prejudice"); **Utah:** *Stephens Ranch & Live Stock Co.* v. *Union Pac. R.R.*, 161 P. 459, 462 (Utah 1916) ("It is quite true that, where it is made to appear that the verdict is excessive, and that such excess is the result of passion and prejudice, or either, the error cannot be cured by remitting the excess from the verdict."); **Vermont:** *Smith* v. *Martin*, 106 A. 666, 673 (Vt. 1919) ("The general rule is that, where an excessive verdict has been rendered through bias, passion, or prejudice, the error taints the whole verdict, and cannot be cured by remittitur, but the defendant is entitled to a new trial as matter of right."); **Washington:** *Olson* v. *N. Pac. Ry.*, 96 P. 150, 152 (Wash. 1908) (Where "the verdict discloses such passion and prejudice on the part of the jury," remittitur is inappropriate because "it would be unjust to hold a litigant foreclosed by any of the findings."); **West Virginia:** *Unfried* v. *Baltimore & Ohio R.R.*, 12 S.E. 512, 518-519 (W. Va. 1890).

Similarly, in *Chicago & Erie Railroad* v. *Binkopski*, 72 Ill. App. 22 (1897), "passion and prejudice was induced by improper remarks and conduct of counsel for appellee during the progress of the trial." Under these circumstances, the appellate court held, "remittitur does not render the judgment a wholesome one." *Ibid.* "If the minds of the jurors were prejudiced against the defense by the language and repeated insinuations of appellee's counsel," the court explained, "then there was not that cool and deliberate consideration of the evidence as to the vital issue in the case, to wit, appellant's liability on account of negligence, that should be had in every case." *Ibid.*

Only a scattered handful of courts appear to have deviated from this view. See, *e.g.*, *Ross* v. *Clark*, 274 P. 639, 641-642 (Ariz. 1929); *Grant* v. *Louisville & N. R.R.*, 165 S.W. 963, 965-966 (Tenn. 1914).

The historical practice thus confirms that there is a deeply rooted tradition (grounded in both logic and principles of fundamental fairness) of ordering a new trial upon finding that a verdict is the product of passion and prejudice. That tradition reinforces the conclusion that this remedy is required by the Due Process Clause.

D. This Case Is An Ideal Vehicle For Resolving The Conceptual Confusion In The Lower Courts.

This case demonstrates precisely why passion and prejudice resulting from inflammatory rhetoric or similar extrinsic sources may be corrected only by a new trial. Here, there can be no doubt that plaintiffs' trial counsel made a concerted effort to rouse passions and prejudices in the jury. Counsel made

unsupported assertions that petitioners gave enough women cancer to fill two local college football stadiums (and then showed the jury pictures of the stadiums). She recited an irrelevant and highly inflammatory "monologue" about the Race for the Cure that described women whose breasts were "cut off and thrown in the trash," whose skin "blistered hot from the radiation" used in their cancer treatments, and who had gone bald and lost their eyebrows and eyelashes from such treatments. She also injected into the trial the salaries of petitioner's executives purportedly for the jury's use in setting plaintiffs' compensatory damages. Pet. 5-6. These statements were monumentally prejudicial; they resulted not just in grossly excessive awards of compensatory and punitive damages, but also in the kind of extrinsic passion and prejudice that infects the entirety of the deliberative process—a departure from impartiality that was borne out by the jury's undeniably impermissible effort to incorporate prematurely $100 million of punitive damages into the compensatory awards and its restoration of that amount at the close of proceedings. Pet. 6-7.

The Supreme Court of Nevada, however, found that "[t]o the extent that the complained-of closing arguments inflamed the jury's passion and prejudice against [petitioner], we conclude that the district court properly reduced the * * * compensatory damages award in light of the conflicting evidence presented." Pet. App. 36a n.11. And it held that the improper verdicts "were spared" when the court reduced the awards. *Id.* at 43a. The case thus could not more squarely present the question whether remittitur is a constitutionally adequate remedy for a verdict that is the product of passion and prejudice. The

Court should grant the petition to resolve that important, recurring issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2011

APPENDIX

APPENDIX A

CORPORATE MEMBERS OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.[1]

3M

Altec Industries

Altria Client Services Inc.

Arai Helmet, Ltd.

Astec Industries

Bayer Corporation

Beretta U.S.A Corp.

BIC Corporation

Biro Manufacturing Company, Inc.

BMW of North America, LLC

Boeing Company

Bombardier Recreational Products

BP America Inc.

Bridgestone Americas Holding, Inc.

Brown-Forman Corporation

Caterpillar Inc.

Chrysler Group LLC

Continental Tire the Americas LLC

Cooper Tire and Rubber Company

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[1] As of April 4, 2011.

Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Environmental Solutions Group
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation

Johnson & Johnson

Johnson Controls, Inc.

Joy Global Inc., Joy Mining Machinery

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Kolcraft Enterprises, Inc.

Kraft Foods North America, Inc.

Leviton Manufacturing Co., Inc.

Lincoln Electric Company

Magna International Inc.

Marucci Sports, L.L.C.

Mazak Corporation

Mazda (North America), Inc.

Medtronic, Inc.

Merck & Co., Inc.

Michelin North America, Inc.

Microsoft Corporation

Mitsubishi Motors North America, Inc.

Mueller Water Products

Mutual Pharmaceutical Company, Inc.

Navistar, Inc.

Niro Inc.

Nissan North America, Inc.

Novartis Pharmaceuticals Corporation

PACCAR Inc.

Panasonic

Pella Corporation

Pfizer Inc.

Porsche Cars North America, Inc.

Purdue Pharma L.P.

Remington Arms Company, Inc.

RJ Reynolds Tobacco Company

Schindler Elevator Corporation

SCM Group USA Inc.

Segway Inc.

Shell Oil Company

The Sherwin-Williams Company

Smith & Nephew, Inc.

St. Jude Medical, Inc.

Stanley Black & Decker, Inc.

Subaru of America, Inc.

Synthes (U.S.A.)

Techtronic Industries North America, Inc.

Terex Corporation

TK Holdings Inc.

The Toro Company

Toyota Motor Sales, USA, Inc.

Vermeer Manufacturing Company

The Viking Corporation

Volkswagen Group of America, Inc.

Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.